IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 70 0F 2000.

Subhash Ghogle,
presently at Central Jail,
Aguada, Goa. ... Appellant.

Versus

State. ... Respondent.

Mr. S.G. Dessai, Senior Advocate with Mr. Arun Braz de Sa, Advocate for the Appellant.

Mr. A.P. Lawande, Public Prosecutor for the Respondent.

Coram: V.C. DAGA AND
P.V. HARDAS, JJ.

Date: 1st July 2002.

J U D G M E N T (PER HARDAS, J.)

On the allegations that on 4th/5th January 1999 the appellant/accused had manually strangulated one Bernadette Pereira on the first floor of Lobster Pot Bar and Restaurant, Tourist Complex, Calangute, the appellant was convicted by the Additional Sessions Judge, Mapusa, in Sessions Case No. 13 of 1999, by Judgment dated 30th August 2000 and was sentenced to suffer imprisonment for life. The appellant, in the present appeal, assails the aforesaid conviction and sentence for an offence punishable under Section 302 of the Indian Penal Code.

2. The facts, as are necessary for the decision of the appeal, are set out hereunder:-

P.I. Umesh Gaonkar (P.W.16) was the Officer in-charge of Calangute Police Station in January 1999. On 5th January 1999 P.W.16 P.I. Gaonkar recorded the complaint of Mrs. Lorna Fernandes (P.W.12). The said complaint is at Exhibit P.W.12/A. On the basis of the said complaint P.W.16 P.I. Gaonkar registered an offence vide Crime No. 1/99 under Section 302 of the Indian Penal Code. After registration of the offence, he proceeded to the scene of offence, which was the Lobster Pot Bar and Restaurant, Calangute. Secured the presence of two panchas, namely, P.W.2 Salvador Lobo and one Francis D'Souza and recorded the scene of offence panchanama, which is at Exhibit P.W.2/A. By the said scene of offence panchanama certain articles from the scene of offence, that is, one light green colour pillow cover, one blue and pink colour pillow cover, one pair of blue colour rubber slipper of size 8, one pair of blue colour rubber slipper of size 5, one wrist watch manufactured by HMT, one pair of spectacles, described in the panchanama as 'sight glasses', one small black colour button and one double folding nylon mat, were attached. P.W.16 P.I. Gaonkar then drew the inquest panchanama in the presence of the aforesaid witnesses, which is at Exhibit P.W.2/B. According to P.W.16 P.I. Gaonkar, the appellant/accused came to be arrested on the same day at about 10.00 a.m. and the arrest panchanama at Exhibit P.W.4/A was drawn in the presence

of P.W.4 Bruno D'Souza and one Elidio Lobo. On the same day P.W.16 P.I. Gaonkar recorded the statements of some of the witnesses. On 6th January 1999 the appellant/accused was sent for medical examination at the Goa Medical College and was examined by P.W.1 Dr. Silvano Sapeco. The medical certificate regarding the examination of the appellant/accused by P.W.1 is at Exhibit P.W.1/F. As per the report of P.W.1 Dr. Sapeco, the appellant/accused had four injuries. The said injuries are:-

> "1. There was a gaping lacerated wound of 1 x 1/4 x 1/4 cms. at right index pulp's inner aspect with protrusion of inner fat and gaping dried soft scabbed area directed from below upwards and inwards.
>
> 2. There is a gaping lacerated wound of 1 x 1/4 x 1/4 cms. at right index finger's nailbed region with dried blood within nailbed's gap aspect.
>
> 3. Soft scabbed grazed abrasional area of 1 x 1/2 cms. seen at right inner aspect of wrist.
>
> 4. Linear soft scabbed abrasion of 1 cm. x linear seen at left outer aspect of wrist."

3. According to P.W.1 Dr. Sapeco injuries 1 and 2 were caused by blunt object or force impact and were consistent with the alleged human bite mark and were of 24 to 48 hours duration and were simple in nature. In respect of injuries 3 and 4, according to P.W.1 Dr. Sapeco, the said injuries could be caused by a blunt

force or object impact and could also be caused due to nails of the alleged victim while resisting. The appellant/accused was examined on 5th January 1999 at 11.45 a.m. by D.W.2 Dr. Laxmikant Lawande, who, at the relevant time, was working as a Medical Officer at Candolim Health Centre. D.W.2 Dr. Lawande had noticed injury on the right index finger of .8 cms. x .05 cms. x .05 cms.. He had also noticed an abrasion on the base of the nail of the right index finger. The said certificate of D.W.2 Dr. Lawande is at Exhibit P.W.16/D-1.

4. On 8th January 1999 P.W.16 P.I. Gaonkar had searched the room in the Lobster Pot Bar and Restaurant and a panchanama to that effect vide Exhibit P.W.4/C was recorded in the presence of P.W.4 Bruno D'Souza. One photograph of the accused and the deceased was attached vide Exhibit P.W.4/B. The muddemal property and the viscera was forwarded by P.W.16 P.I. Gaonkar to the Central Forensic Science Laboratory.

5. Postmortem on the dead body of Bernadette was performed by P.W.1 Dr. Sapeco on 5th January 1999. P.W.1 Dr. Sapeco noticed that in an area of 12 x 8 cms. along the front of the face, nostrils, lips and left side of cheek there were 11 semilunar shaped human nail imprint marks at various directions and sizes.

According to him, there were human nail imprint marks caused with blunt force impact of palm and fingers. He also noticed that in an area of 22 x 12 cms. along the whole of neck there were 17 semilunar shaped nail imprint marks which were human nail imprint marks caused due to blunt force impact of palm and fingers. He noticed red contusion of 1 1/2 cms. on left shoulder, linear abrasion on left mid back shoulder blade region and linear abrasion near the pinna of the ear. The postmortem report is at Exhibit P.W.1/A. On internal examination he had noticed "both cornuae of hyoid bone were fractured". The stomach contained 550 gms. of masticated minced meat and vegetables. He, therefore, opined that death was due to asphyxia as a result of manual strangulation. The report of the examination is at Exhibit P.W.13/C. The green colour pillow cover, pink colour pillow cover and the wrist watch were found to be stained with blood. The serological report states that there were stains with blood of 'B' group. The dress of the deceased was also found to be stained with human blood. The blood group of the deceased was ascertained to be of 'B' group.

6. P.W.15 P.I. Govekar, who had taken over the investigation from P.W.16 P.I. Gaonkar, on 2nd March 1999, filed a chargesheet in the Court. After committal of the case to the Court of Sessions, the learned

Additional Sessions Judge, Mapusa, vide Exhibit 6 framed a charge against the appellant/accused for an offence punishable under Section 302 of the Indian Penal Code. The appellant abjured his guilt and claimed to be tried. In support of its case the prosecution examined 16 witnesses. The appellant in his defence stated that he had been falsely implicated and in support of his defence examined D.W.1 Sadanand Arolkar and D.W.2 Dr. Laxmikant Lawande. The learned Additional Sessions Judge, accepted the prosecution case and convicted and sentenced the accused as aforestated.

7. Mr. S.G. Dessai, the learned senior counsel appearing for the appellant, has not challenged the postmortem conducted by P.W.1 Dr. Sapeco on the body of the deceased. Similarly, he has also not challenged the evidence of P.W.2, the panch witness. He has also not challenged the evidence of P.W.4 Bruno D'Souza, panch witness. Similarly, there is no challenge to the testimony of P.W.13 Dr. N.R.K. Rao, who was Senior Scientific Assistant.

8. The case against the appellant rests on circumstantial evidence. Before a conviction can be based, the prosecution has to prove each of the circumstances on which it relies. The circumstances so proved should have a definite tendency pointing to the

guilt of the accused, though each of the circumstance by itself may not be conclusive but the cumulative effect of proved circumstance must be so complete that it must exclude every other hypothesis and unequivocally point to the guilt of the accused. The evidence in this case has, therefore, to be examined from the point of view whether the prosecution has been able to prove the circumstance alleged against the accused and whether the circumstance, so proved, formed a complete chain, the cumulative effect is to exclude the innocence of the accused and unerringly point to the guilt of the accused.

9. The pivot of the prosecution case is the testimony of P.W.9 Ranjit Divakar and P.W.10 Cursiano Gonsalves. According to P.W.9 Ranjit, in the year 1999 he was working as a cook at the Lobster Pot Bar and Restaurant at Calangute. According to him, the appellant/accused was the owner of the said Bar and Restaurant. He corrects himself to state that both the deceased, to whom he refers as 'Madam Pereira', and the appellant were the owners of the said Bar and Restaurant. According to him, he used to sleep in a room on the ground floor alongwith the other workers. According to him, on 4th January 1999, he was sleeping outside the said room and at about 12.30 in the night he heard the sounds of fights on the first floor.

According to him, the appellant and the deceased were sleeping on the first floor. He heard the deceased shouting and calling him as John. According to him, the deceased used to usually call him 'John'. The deceased had shouted 'John help me'. On hearing the noise of the quarrel, P.W.9 Ranjit woke up the other workers and went out but could not reach the first floor as the door was closed. According to him, many people had gathered outside. Also according to him, the deceased was shouting 'by giving gagging sound'. P.W.9 Ranjit states that they attempted to break open the door but could not do so. The gagging sound gradually diminished and then completely stopped. P.W.9 Ranjit then went to a telephone booth and called the relatives of the deceased but since he was scared and trembling, he could not speak properly and, therefore, told the in-charge of the telephone booth P.W.5 Ramkishan Chopra to inform the inmates of the house of the deceased to come immediately. Thereafter, they were waiting outside the Bar and Restaurant and after about half an hour P.W.12 Lorna, daughter of deceased and P.W.3 Crisand Pereira, husband of P.W.12 Lorna came to the Lobster Pot Bar and Restaurant. On their arrival P.W.9 narrated what had happened. On hearing this, Lorna started crying that deceased might have been killed and she went to bring the police. According to P.W.9 Ranjit, thereafter, he went to drink water and at that time noticed that the

kitchen door was slightly ajar and the exhaust fan, which had been earlier switched off, had been switched on. His evidence further discloses that he alongwith the police went to the first floor and found the deceased lying dead on the bedding. He states that while going to bed, the deceased had earlier said to him 'goodnight' and he had also seen the appellant/accused going to bed on the first floor. According to him, besides the accused and the deceased, nobody had gone on the first floor to sleep.

10. From the evidence it appears that the Lobster Pot Bar and Restaurant is a hexagonal shaped building, which has four exterior doors on the ground floor. The Restaurant is situated on the first floor, which has a iron grill upto 1 metre in height. In order to approach or go to the first floor there are two doors. One door is described by the witness as a main door, which leads to the staircase for going to the first floor. The other door is an exterior door to the kitchen. Through this door one can have access to the first floor. It is these two doors which were closed from inside. The other two exterior doors are one leading to the room in which the workers used to sleep and the other provides an access to the ground floor. This other door, according to the witness, used to be permanently closed. There is no internal access from the room, in which the

workers used to sleep, to the other rooms on the ground floor. The room where the workers used to sleep has been described as a store-room.

11. P.W.9 Ranjit admits in his cross-examination that there used to be occasionally verbal quarrels between the accused and deceased. According to him, despite the quarrels, the accused and the deceased were talking with each other. In the cross-examination P.W.9 Ranjit admits that the accused used to sleep on the first floor of the said Bar and Restaurant and he had never seen him going to his house at any time during the four months' service period. In the cross-examination he has also admitted that during his four months' service he had gone to his house at Trivandrum three times and he used to return after seven days on each occasion. In the cross-examination he has stated "earlier to the incident at 23.30 hours I had prepared chapati and fish mayonnaise to Madam Pereira. She gave me the empty plate and said 'thank you' as such I say she must have eaten chapati and the fish." In the further cross-examination he has admitted "I had seen the acc. going for sleep on the first floor on 4.1.1999 and I had stated so to the police. Confronted with this statement where it is not so recorded. To the explanation I say I had told the police that I had served food to both of them and they had gone to sleep

on the first floor but I do not know why it is not so recorded." The omission in the police statement is to his assertion of seeing the appellant going to bed on the first floor, which is stated by him in the examination-in-chief. It appears that he had volunteered that he had served food to both of them and, therefore, to his statement which he had volunteered that he had served food to both of them the omission was brought out in respect of the serving of food. Even if the fact that he had served food is not considered as an omission, it can be accepted as a statement which is volunteered by the witness. Thus, according to this witness, he had served food to both the appellant and the deceased on the night of 4th January 1999.

12. P.W.10 Cursiano states that he was working as a waiter in the Lobster Pot Bar and Restaurant at Calangute from 18th December 1998. He states that P.W.9 Ranjit was the cook in the said Restaurant. According to him, on 4th January 1999, the Bar and Restaurant was closed at about 11.00 p.m.. He further states "I served to both the acc. and said Bernadette food on the first floor at about 11.30 p.m. and came back and went to sleep in the room meant for the workers in the same building." He states that after some time P.W.9 Ranjit woke him up and he went outside and heard the gagging sound of the deceased. They tried to reach the first

floor but could not do so as the door leading to the first floor was closed. He states that thereafter the gagging sound stopped and P.W.9 Ranjit went to phone P.W.3 Crisand, whom he refers to as 'Cruz'. According to him, after some time Cruz and Lorna came and Lorna gave a call to her mother but there was no response. Thereafter Lorna went and brought the police and went to the first floor and shouted that her mother was dead.

13. In the cross-examination this witness has asserted that he saw deceased Bernadette on 4th January 1999 at 11.00 p.m. when he served her food. He states that he did not personally see where she was sleeping. He states that he also does not know where the accused was sleeping. He admits not to have stated to the police that at about 11.00 p.m. P.W.9 Ranjit told him to serve food to Bernadette and the accused. He also admits not to have stated to the police that he gave food to both of them on the first floor and after having dinner they all went outside closing the back door from inside and front door from outside. He was confronted with the portion in his statement so recorded by the police and he did not know why it was so recorded. This contradiction assumes importance in view of the fact that in the earlier part of the cross-examination he had stated: "I do not know who had closed the door of the restaurant. I did not go to see

whether the doors were closed or open."

14. The fact whether the appellant/accused was on the first floor alongwith the deceased Bernadette when dinner was served to Bernadette assumes importance. The evidence of P.W.9 Ranjit and P.W.10 Cursiano is pivotal to the prosecution case for establishing the said fact. Both the witnesses claimed to have served dinner to Bernadette and in the process of serving dinner claimed to have noticed the appellant/accused on the first floor. In view of the statement of both the witnesses, the recitals in the postmortem report assumes importance. P.W.1 Dr. Sapeco has stated that the stomach contained 550 gms. of masticated minced meat and vegetables. In his cross-examination P.W.1 Dr. Sapeco has stated "I have mentioned that there was masticated meat. This meat was of animal and not fish." This finding of P.W.1 Dr. Sapeco is otherwise insignificant finding but assumes importance in view of the conflicting claims made by P.W.9 Ranjit and P.W.10 Cursiano of having served fish to deceased on the first floor. The claim of P.W.9 Ranjit and P.W.10 Cursiano of having seen the appellant/accused on the first floor when the food was served is of vital importance to the prosecution. In view of the fact that the stomach contents did not disclose that the deceased had eaten fish, a doubt arises regarding the veracity of the claim

of P.W.9 Ranjit and P.W.10 Cursiano that they had served fish to the deceased and had seen the appellant/accused on the first floor. Who actually from out of P.W.9 Ranjit and P.W.10 Cursiano had served and whether in fact food was served to the deceased on the first floor as claimed by P.W.9 Ranjit and P.W.10 Cursiano becomes doubtful. The truth and the falsehood regarding the claim of P.W.9 Ranjit and P.W.10 Cursiano are so inextricably mixed up that it is difficult to separate their testimony. We have, therefore, no other alternative before us, but to reject the testimony of P.W.9 Ranjit and P.W.10 Cursiano that they had served food to the deceased on the first floor and had noticed the appellant/accused on the first floor. This takes us to the evidence of P.W.12 Lorna.

15. P.W.12 Lorna speaks about the deceased Bernadette being a partner with the accused in the business of running of Lobster Pot Bar and Restaurant at Calangute. She also speaks about the fact that two days prior to the date of incident deceased Bernadette had come to her house and had told her that Bernadette had been assaulted by the accused. P.W.12 Lorna claims that the deceased was bleeding from her mouth. P.W.12 Lorna also refers to an incident about a year prior where there was a dispute between the accused and the deceased Bernadette. P.W.12 Lorna states that a day prior to the

incident, the deceased had telephoned her and had expressed that she was afraid of the accused. She states that at about 12.00 or so she had received a phone call message from her brother that there was some trouble in the Restaurant. She, therefore, came to the Lobster Pot Bar and Restaurant and saw a crowd of people had gathered. According to her, both the doors of the Restaurant were closed. She, therefore, went to the police station and again came back to the Restaurant. She was followed by the police. She was informed by the cook that the rear door was open and, therefore, she went to the first floor alongwith the police and found that the deceased had fallen on the mat.

16. In the cross-examination she admits that she did not file any complaint to the police regarding the assault on her mother a month back. She also denied the suggestion that she had falsely stated that she had brought her mother deceased Bernadette home and had kept the deceased at her house for 15 days and after some time the accused had called the deceased to stay in the Restaurant. She accepted the fact that she had not stated in the complaint that the accused also used to sleep on the first floor. She admitted that the house of the accused is at Tivim. She has stated that the Restaurant on the first floor is having grill on all sides. She admits to have stated to the police that she

had heard the sound of the accused as if he was awakening somebody. When confronted with the complaint she admitted that it was not so recorded.

17. P.W.3 Crisand is the husband of the sister of P.W.12 Lorna and son-in-law of the deceased. He states that a day prior to the incident he had heard the appellant/accused and the deceased Bernadette fighting and the deceased questioning as to why he was assaulting her. He had gone towards them and had questioned them as to why they were fighting. This witness states that he had seen blood on the mouth of Bernadette and he had heard deceased Bernadette telling the accused that she would go home. He states that on 5th January 1999 he had received a call from P.W.12 Lorna and on receiving the call he had gone to Calangute. In the cross-examination he states that the accused and Bernadette were staying in the said hotel for last 7 to 8 years and prior to that the accused and the deceased were doing business at Candolim. He also states that accused and deceased Bernadette had good relations with each other. He admits that he had not stated to the police that he had seen the accused and the deceased fighting nor that he had seen the assault on the deceased.

18. From the evidence of these two witnesses it

does emerge that there were slight bickerings between the accused and the deceased in respect of running of the business. However, it does not appear that their relations were strained to any great degree as the deceased continued to reside in the hotel on the first floor and had also permitted the appellant/accused to reside with her on the first floor.

19. The prosecution has also examined P.W.5 Ramkishan Chopra, who, at the relevant time, was running an STD booth. He states that his telephone booth is 6 metres away from the restaurant run by the appellant/accused. He further states that both the accused and the deceased Bernadette were staying in the same restaurant. He further states "during night time also I presume they were staying in the said hotel" He further states that on 5th January 1999 at 12.30 p.m. he heard the sound of people gather;OAoutside the restaurant and he heard deceased Bernadette saying 'dhar ugad' (open the door). He also states that he tried to call 'Subhash' (meaning the appellant). He states about the fact that the cook had come to his STD booth and tried to call the son of the deceased Bernadette. In the cross-examination he states that he had not personally seen the deceased and the accused sleeping together on the first floor. He states that he does not have any personal knowledge that the deceased was going

to his house for sleeping. He was confronted with the omission in his police statement that the accused and deceased were sleeping on the first floor. He denied the suggestion that the cook had not come to telephone. He also denied the suggestion that he had not heard any sound. The evidence of this witness, according to us, does not assist the prosecution in proving its case any further.

20. According to Mr. Lawande, the learned Public Prosecutor appearing for the State, the following circumstances emerge from the evidence of the witnesses:-

1. The relations between the appellant/accused and the deceased were strained and the strained relations furnishes a motive.

2. The appellant/accused used to usually stay in the company of the deceased on the first floor of the hotel.

3. The appellant/accused and the deceased were alone on the first floor at about 11.30 p.m.. This circumstances emerges from the evidence of P.Ws. 9 and 10.

4. Shouts of quarrels were heard from the first floor by P.Ws. 5, 9 and 10.

5. The appellant/accused has not offered any explanation regarding his presence at 11.30 p.m. on the first floor.

6. Both the doors were initially found closed by the witnesses and later on P.W.9 noticed the rear door to be opened. Thus an inference can be drawn that the accused had escaped from the rear door after committing the crime.

7. Death is homicidal.

8. Injury on the accused is consistent with the prosecution case and which is not explained by the accused.

9. Statement made by the accused to P.W.1 when he was being examined.

10. Blood of 'B' group found on the wristwatch, which was identified to be that of the appellant/accused.

11. The false defence taken by the accused

furnishes the additional link.

21. In respect of the first circumstance regarding motive, we have already observed that it appears that there was some dispute between the appellant/accused and the deceased Bernadette, but, according to us, the degree of animosity was not to such an extent as would impel the accused to commit the offence. Any case resting on circumstantial evidence, proof of motive assumes great importance. However, if the prosecution is unable to establish motive, it does not affect the prosecution case, if there are other clinching circumstances. We, therefore, hold that as far as the first circumstance is concerned, motive is not clearly spelt out but the relations between the appellant/accused and the deceased were somewhat strained.

22. As to the second circumstance, it is established that the accused some times during the night used to sleep on the first floor. The deceased Bernadette was also sleeping on the first floor.

23. As to the third circumstance that the accused was seen on the first floor in the company of the deceased at about 11.30 p.m., according to us, has not been conclusively proved by the prosecution. The proof

of this circumstance is wholly dependant on the reliability of the testimony of P.W.9 Ranjit and P.W.10 Cursiano. In the earlier part of the Judgement we have held that P.Ws. 9 and 10 cannot be relied upon. So, therefore, according to us, this circumstance has not been proved by the prosecution.

24. In respect of the fourth circumstance that the prosecution witnesses had heard the quarrel and shouts of the deceased, it was submitted by Mr. Dessai, the learned senior counsel for the appellant, that P.W.9 Ranjit in his cross-examination has admitted "I could not hear the acc. and Madam Pereira but I could make out that the fight was with heated Konkani words." According to Mr. Dessai, the learned senior counsel, mere hearing of the noise of quarrel or of shouts as a circumstance, is insignificant unless and until the prosecution is able to establish that the witness had heard the voice of the accused. We agree with the submissions of the learned counsel for the appellant and hold that the prosecution has not been able to prove that the appellant and the deceased, who are alleged to be on the first floor, had quarrelled. The identity of the appellant as the person who had quarrelled with the deceased is not established.

25. In respect of the fifth circumstance

regarding non-explanation by the accused, our attention was invited to Question No. 55 of the Statement under Section 313 Cr.P.C., in which the accused was questioned regarding the testimony of P.W.10 that he had served food to the appellant and Bernadette. The accused had stated that this was false. According to us, the accused has taken a defence of denial by stating that he was not present when food was served. In such circumstance, it cannot be said that the accused has not offered any explanation.

26. In respect of the sixth circumstance, it was submitted by Mr. Lawande, the learned counsel for the State, that this is a strong circumstance which conclusively establishes that the appellant/accused was the perpetrator of the crime. According to the learned counsel, the accused was seen in the company of the deceased at 11.30 and both the doors were closed from inside thus, preventing the prosecution witness from effecting an entry to the first floor. Thereafter, the rear door was found open. This, according to the learned counsel, conclusively establishes that it was the accused and he alone who could have committed the offence. We have already held that the prosecution has not been able to establish that on the relevant day the accused was seen in the company of the deceased at 11.30 on the first floor. Thus, it cannot be said that the

accused was alone in the company of the deceased at 11.30. If that is so, the mere fact that earlier the witness had found the two doors closed and thereafter the rear door was found open would not irresistibly lead to the conclusion that it was the appellant and the appellant alone who had committed the offence. This is a circumstance where the prosecution has been able to prove that the two doors were closed from inside and thereafter the rear door was found slightly ajar.

27. In respect of the seventh circumstance, the prosecution has been successful in establishing the death of the deceased was homicidal through the testimony of P.W.1 Dr. Sapeco.

28. In respect of the eight circumstance, it was urged by Mr. Dessai, the learned senior counsel for the appellant, that the appellant has examined D.W.2 Dr. Lawande, who had examined the accused on 5th January 1999 at 11.45 a.m.. The evidence of D.W.2 Dr. Lawande reveals that the injury to the index finger of the appellant/accused could be caused by a dog bite. D.W.2 was cross-examined by the learned Public Prosecutor and in the cross-examination D.W.2 has admitted that it could be by human bite also. P.W.1 Dr. Sapeco had noticed three other injuries apart from the injury to the right index finger and has opined that the injury

could be by human bite. Thus, the prosecution has been able to establish that the appellant/accused had one injury to the right index finger. However, in view of the testimony of D.W.2, the prosecution has not been able to establish that the injury was as a result of human bite.

29. In respect of the ninth circumstances, it is urged by Mr. Lawande, the learned counsel for the State, that when P.W.1 Dr. Sapeco had examined the appellant/accused, the appellant/accused is admitted to have sustained bite mark on the right index finger. P.W.1 Dr. Sapeco also refers to a confessional statement alleged to have been made by the appellant/accused. However, this disclosure by the appellant/accused alleged to have been made to P.W.1 Dr. Sapeco has not been put to the appellant/accused in his statement under Section 313 Cr.P.C. and, therefore, the same cannot be taken into consideration and used against the appellant/accused. Thus, according to us, this circumstance is not proved by the prosecution.

30. In respect of the tenth circumstances, that is, the finding of blood of 'B' group on the wristwatch of the appellant, it was rightly argued by the learned counsel for the appellant that the prosecution has not been able to establish that the wristwatch belonged to the appellant. On the basis of a photograph which showed that the appellant was wearing a similar wristwatch, the prosecution sought to establish that the wristwatch belonged to the appellant. Such evidence of

identity, according to us, is extremely weak piece of evidence to establish that the wristwatch belonged to the appellant. Assuming that the wristwatch belonged to the appellant, according to us, this as a circumstance is extremely innocuous as the appellant was said to be residing on the first floor and, therefore, the presence of blood of 'B' group on the wristwatch which was found at the scene of offence would not connect the accused with the commission of the crime. We, therefore, hold that the prosecution has not been able to establish that the wristwatch belonged to the appellant. It was urged by Mr. Lawande learned counsel appearing for the State that the false defence taken by the appellant furnishes the missing link in the chain of circumstances. We have already held that the prosecution has not been able to establish that the appellant was seen in the company of the deceased on the first floor at 11.30 p.m. and, therefore, the explanation of the appellant that he was not present cannot be termed as false. Thus, this circumstance is not available to the prosecution. The prosecution has only established that the two access doors were closed and thereafter the rear door was found opened.

31. Therefore, the prosecution has been able to

establish that the relations between the deceased and the appellant/accused were slightly strained and the appellant/accused used to some times reside on the first floor of the hotel. The prosecution has also been able to establish that during the night the witness had heard shouts of a quarrel from the first floor. The prosecution has also been able to establish that the death of the deceased was homicidal and that the appellant/accused had an injury on the right index finger which could either be due to human bite or dog bite. A wristwatch was found on the first floor which had blood stains of 'B' group, that is, the blood group of the deceased. According to us, therefore, the cumulative effect of these circumstances does not conclusively establish that it was the appellant who had committed the murder of deceased Bernadette. The circumstances so proved do not exclude the hypothesis of the innocence of the accused and do not unerringly point to the guilt of the accused. The cumulative effect of all these circumstances may at the highest raise suspicion against the appellant. Suspicion, however strong, is not sufficient to convict an accused. We have perused the Judgment of the trial Court and we have noticed that the trial Court did not undertake the exercise of trying to ascertain that the proved circumstances unerringly point to the guilt of the accused while excluding his innocence. According to us,

the appellant/accused is entitled to be given the benefit of doubt and deserves to be acquitted.

32. In the result, therefore, Criminal Appeal is allowed. The conviction and sentence passed by the learned Additional Sessions Judge, Mapusa, in Sessions case No. 13 of 1999, by Judgment dated 30th August 2000, convicting the appellant for an offence under Section 302 and sentencing him to imprisonment for life, is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged. The appellant to be released forthwith, if not wanted in any other case. Fine, if paid, be refunded to the appellant.

(V.C. DAGA)
JUDGE.

(P.V. HARDAS)
JUDGE.

ed's.